

## BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of	)	
	)	DOCKET NO. 20050
[REDACTED],	)	
	)	DECISION
Petitioner.	)	
_____	)	

### Procedural Overview

On August 21, 2006, the staff of the Tax Discovery Bureau (“Bureau”) of the Idaho State Tax Commission (“Commission”) sent a letter to [Redacted] (“Petitioner”). Through the letter the Bureau informed the Petitioner that the Commission had received notification from an unlicensed Idaho [Redacted] (“[Redacted]”) that Petitioner had purchased [Redacted] over the Internet, telephone, and/or by mail order. The Bureau informed the Petitioner that he owed a penalty to the State of Idaho.

Petitioner did not respond to the August 21, 2006, letter and so on December 1, 2006, the Bureau issued a Notice of Deficiency Determination (“NODD”) to Petitioner which included a penalty, according to Idaho Code §63-2512(b), for the [Redacted] in the total amount of \$684.

On January 8, 2007, the Bureau received a letter from Petitioner contesting the NODD. The Bureau sent Petitioner a letter dated January 23, 2007, notifying the Petitioner that his letter was not a valid or “perfected” protest and provided information to the Petitioner of how to provide a valid or “perfected” protest.

On February 22, 2007, the Bureau received a valid or “perfected” protest of the NODD from Petitioner. After another exchange of letters failed to resolve the matter, the Bureau forwarded the file to the legal staff of the Idaho State Tax Commission to defend the NODD.

In a letter dated April 24, 2007, the Commission, through legal counsel, sent a letter to Petitioner notifying him of the process for redetermining a protested deficiency determination. Petitioner did not respond to this letter.

In a letter dated June 13, 2007, the Commission, again through legal counsel, sent a letter to Petitioner. This letter included a copy of the April 24, 2007, letter and notified Petitioner that failure to respond to this letter would result in a decision in this matter being issued based upon the material currently in the file. Petitioner did not respond to the June 13, 2007, letter.

### Discussion

The United States Congress through the Jenkins Act, 15 U.S.C. §376, requires that:

“[A]ny person who sells or transfers for profit cigarettes in interstate commerce, whereby such cigarettes are shipped into a State taxing the sale or use of cigarettes, to other than a distributor licensed by or located in such State, or who advertises or offers cigarettes for such a sale or transfer and shipment, shall—

(1) first file with the tobacco tax administrator of the State into which such shipment is made or in which such advertisement or offer is disseminated a statement setting forth his name and trade name (if any), and the address of his principal place of business and of any other place of business; and

(2) not later than the 10th day of each calendar month, file with the tobacco tax administrator of the State into which such shipment is made, a memorandum or a copy of the invoice covering each and every shipment of cigarettes made during the previous calendar month into such State; the memorandum or invoice in each case to include the name and address of the person to whom the shipment was made, the brand, and the quantity thereof.

In compliance with the Jenkins Act, 15 U.S.C. § 376, [Redacted], a state of [Redacted] company, provided four invoices to the Commission. These invoices reflect orders of cigarettes shipped to [Redacted] in July, August, September, and October of ten cartons each month for a total of 40 cartons. Pertinent language to this matter at the bottom of each invoice reads, “[T]he

purchaser is responsible for payment of any state, local or excise taxes, so please contact your state government for information on remitting any taxes on reported sales.”

Idaho Code §63-2512(b) provides that:

The possession, purchase or consumption by any person of more than ten (10) packages of cigarettes without Idaho cigarette stamps is prohibited. Any person who possesses, purchases or consumes more than ten (10) packages of cigarettes without Idaho cigarette stamps shall be subject to a civil penalty equal to three (3) times the amount of tax due for each full or partial package of unstamped cigarettes in excess of ten (10), but in no event shall the penalty be less than fifty dollars (\$50.00). Such penalty shall be assessed and collected, as provided in section 63-2516, Idaho Code.

The penalty imposed by this subsection shall apply to persons acquiring cigarettes from internet, catalog, telephone and facsimile retailers.

Idaho Code §63-2506(1) provides that the tax on the sale of cigarettes is “at the rate of fifty-seven cents (57¢) per package of twenty (20) cigarettes, . . . .”

In accordance with Idaho Code §63-2512(b) and §63-2506(1), the Bureau delivered to Petitioner an NODD for \$684. The Commission believes this is correct except that Idaho Code §63-2512(b) only subjects Petitioner “to a civil penalty equal to three (3) times the amount of tax due for each full or partial package of unstamped cigarettes in excess of ten (10) . . . .” Each carton of cigarettes holds ten packages. Petitioner must pay the penalty for all cartons in excess of the first carton. Therefore, Petitioner must pay the penalty for 39 cartons instead of the 40 cartons set out in the NODD. The NODD is amended to reflect this change.

The tax is calculated at \$.57 per package. I.C. §63-2506(1). Each carton contains 10 packages of cigarettes. Ten packages times \$.57 per package equals \$5.70 per carton. Thirty-nine cartons times \$5.70 per carton equals \$222.30. The penalty is three times the tax of \$222.30

which equals a total of \$666.90. I.C. §63-2512(b). Petitioner owes a penalty of \$666.90 to the state of Idaho.

In his protest received by the Commission on February 22, 2007, the Petitioner gives five reasons why he should not have to pay the penalty provided for in Idaho Code §63-2512(b). The first reason the Petitioner gave was that the taxes were owed by [Redacted] and not the Petitioner. Pursuant to the Jenkins Act, 15 U.S.C. § 376, and Idaho Code §63-2512(b) [Redacted] is only responsible for notifying the state of Idaho of the purchase, and the Petitioner is responsible for payment of the taxes.

The second reason given is that Petitioner is not licensed to collect or send taxes to the State of Idaho. Again, pursuant to Idaho Code §63-2512(b), Petitioner as the possessor, purchaser, or consumer of the unstamped cigarettes in excess of 10 packages is subject to the penalty provided therein.

The third reason given by Petitioner is that [Redacted] never informed him that taxes were due or that the buyer is liable for taxes. As noted above, each invoice notified Petitioner of his responsibility to pay the taxes in his state. In addition, ignorance of the law is not an excuse.<sup>1</sup> State v. Fox, 124 Idaho 924, 866 P.2d 181 (Idaho 1993).

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<sup>1</sup>The California Supreme Court discussed this issue in [Hale v. Morgan, 22 Cal.3d 388, 149 Cal.Rptr. 375, 380, 584 P.2d 512, 517 \(1978\)](#), as follows:

Speaking many years ago within a criminal context, we amplified the principle in this way: “It is an emphatic postulate of both civil and penal law that ignorance of a law is no excuse for a violation thereof. Of course it is based on a fiction, because no man can know all the law, but it is a maxim which the law itself does not permit any one to gainsay. . . . The rule rests on public necessity; the welfare of society and the safety of the state depend upon its enforcement. . . . (If permitted) the plea (of ignorance) would be universally made, and would lead to interminable questions, incapable of solution. Was the defendant in fact ignorant of the law? Was his ignorance of the law excusable? The denser the ignorance the greater would be the exemption from liability. The absurdity of such a condition of the law is shown in the consummate satire of Pascal, where, speaking upon this subject, he says, in substance, that although the less a man thinks of the moral law the more culpable he is, yet under municipal law ‘the more he relieves himself from a knowledge of his duty, the more approvedly is his duty performed.’ ” (quoting from People v. O'Brien 96 Cal. 171, at 176, 31 P. 45, 46-47 (1892)).

The fourth reason Petitioner gives is that [Redacted] and the State of Idaho are acting illegally and collusively to violate Petitioner's rights to free interstate commerce. In Angelica v. Goodman, 52 Misc. 2d 844, 276 N.Y.S.2d 766 (N.Y. Sup. 1966), the Court discussed this issue as follows:

Plaintiff's arguments based upon the Jenkins Act ([15 U.S.Code, s 376](#)) are without merit in every respect. The Act was adopted to aid the States in the administration and enforcement of their cigarette tax statutes. The Federal and State statutes dovetail. Mail order was the subject; loophole plugging was the objective (Senate Report No. 644, July 11, 1949, 2 U.S.Code, Congressional Administration News, pp. 2158, 2159, (1949)). In [Consumer Mail Order Association of America v. McGrath, D.C., 94 F.Supp. 705](#), the Jenkins Act was attacked as unconstitutional. The Court there stated (pp. 709, 710):

'We find no constitutional infirmity in the Jenkins Act. \* \* \*

'It is no answer that some of the state laws taxing the sale or use of cigarettes might not be valid. There is nothing inherently invalid in such laws. \* \* \* We need not, in this general attack upon the Act, go further than to point out that state policy in this area of taxation may validly be the basis for federal regulation of interstate sales or shipments \* \* \* because it has the purpose of aiding generally in the effectuation of valid state policy.'

The fifth and last reason given by Petitioner is that [Redacted] and the State of Idaho violated federal privacy laws by disclosing private records and private contracts of Petitioner. The Jenkins Act, 15 U.S.C. § 376, specifically requires [Redacted] to provide the information under consideration in this case to the Commission. No violation of federal privacy laws has occurred.

## Conclusion

The arguments presented by the taxpayer do not persuade the Tax Commission that the taxpayer does not owe the penalty. However, the penalty is amended as discussed above to reflect the exclusion of one carton of cigarettes in accordance with the language in Idaho Code §63-2512(b). Furthermore, the taxpayer has provided no documentation or information that would show that the NODD prepared by the Bureau is incorrect. It is well settled in Idaho that a Notice of Deficiency Determination issued by the Idaho State Tax Commission is presumed to be correct. Albertson's Inc. v. State, Dept. of Revenue, 106 Idaho 810, 814 (1984); Parsons v. Idaho State Tax Commission, 110 Idaho 572, 574-575 n.2 (Ct. App. 1986). The burden is on the taxpayer to show that the tax deficiency is erroneous. Id. Since the taxpayer has failed to meet this burden, the Tax Commission finds that the amount shown due on the Notice of Deficiency Determination is true and correct as amended.

WHEREFORE, the Notice of Deficiency Determination dated December 1, 2006, is hereby APPROVED, AFFIRMED, AND MADE FINAL AS AMENDED.

IT IS ORDERED and THIS DOES ORDER that the taxpayer pay the penalty discussed herein of \$666.90.

An explanation of the taxpayer's right to appeal this decision is included with this decision.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2007.

IDAHO STATE TAX COMMISSION

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COMMISSIONER

### **CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_\_ day of \_\_\_\_\_, 2007, a copy of the within and foregoing DECISION was served by sending the same by United States mail, postage prepaid, in an envelope addressed to:

[Redacted]

Receipt No.

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